CURRENT DECISIONS

AGENCY—INFANTS—INCAPACITY TO APPOINT AN AGENT.—The plaintiff, an infant, entrusted a stock certificate to the defendant subject to the plaintiff's order. Without further instructions the defendant sold it. When informed of the sale a few days later, the plaintiff accepted the defendant's note instead of the proceeds of the sale. The defendant became bankrupt and the infant, by her guardian ad litem, without a demand or notice of disaffirmance, sued the innocent firms which had effected the sale, and the defendant for the conversion of the certificate of stock. *Held,* that the plaintiff could recover, the acts of an agent appointed by an infant being void. *Casey v. Kastel* (1922, Sup. Ct.) 195 N. Y. Supp. 848.

The instant case applies the orthodox but superannuated rule. *McDonald v. City of Spring Valley* (1918) 285 Ill. 52, 120 N. E. 476. But see *Coursolle v. Weyerhauser* (1897) 69 Minn. 328, 72 N. W. 697; *Benson v. Tucker* (1912) 212 Mass. 60, 98 N. E. 589; 1 Mechem, *Agency* (2d ed. 1914) sec. 145; COMMENTS (1921) 31 YALE LAW JOURNAL, 201; COMMENT ON RECENT CASES (1914) 2 CALIF. L. REV. 311.

BILLS AND NOTES—CERTIFICATION OF CHECK BY TELEGRAM.—In answer to the plaintiff bank's inquiry concerning a check drawn by one X, the defendant bank telegraphed that the check was good. The defendant refused payment, and the plaintiff brought this action. *Held,* that the plaintiff could not recover. *Flathead State Bank v. First Nat. Bank* (1922, C. C. A. 8th) 282 Fed. 398.

An acceptance or certification on a separate paper must unequivocally import an absolute promise to pay. It has been uniformly held that the words "is good" do not under these conditions amount to such a promise. *Colcord v. Banco De Tamaulipas* (1918) 181 App. Div. 295, 168 N. Y. Supp. 710; *First Nat. Bank v. Commercial Savings Bank* (1906) 74 Kan. 606, 87 Pac. 746; *Bank of Springfield v. First Nat. Bank* (1888) 30 Mo. App. 271; L. R. A. 1916C, 179, note.

CHARITIES—TRUSTS TO BRING ABOUT CHANGES IN EXISTING LAWS.—The trust in question was "to promote improvements in the structure and methods of government, with a special reference to the initiative, referendum, and recall," etc; and provided further "that the trustees should have full power . . . . generally to use all lawful means to increase the knowledge of the citizens . . . . upon these governmental and political questions . . . . to the end that popular democratic and efficient government may be promoted in the United States of America." *Held,* that if there is nothing inherently unlawful in the object to be attained or means to be adopted, a trust for a public charity is not invalid merely because it contemplates the procuring of changes in existing laws. *Taylor v. Hoag* (1922, Pa.) 116 Atl. 826.

An early case, holding invalid a trust to secure the passage of laws granting suffrage to women, and holding valid a trust to create public sentiment favorable to the abolition of slavery, has caused great confusion in the law. *Jackson v. Phillips* (1867, Mass.) 14 Allen, 539. The instant case, however, states accurately the modern rule, and contains an excellent review of the authorities. *Garrison v. Little* (1897) 75 Ill. App. 402; see *contra, Bowditch v. Attorney General* (1922, Mass.) 134 N. E. 796 (approving *Jackson v. Phillips* in holding a trust to promote "women's rights" invalid).

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—ADVOCACY OF OVERTHROW OF GOVERNMENT BY FORCE.—The defendants organized and advanced the cause of the Communist Labor Party which advocated the destruction of the United States

Government by force. They were convicted of violating a statute which declared it unlawful to advocate the overthrow of the existing government. Smith's Ill. Rev. Sts. 1921, ch. 38, sec. 557-564. *Held,* (one judge *dissenting*) that the statute was constitutional and that guilt, under its terms, did not require "a present and imminent danger of the success of the plan advocated." *People v. Lloyd* (1922, Ill.) 136 N. E. 505.

Here another statute limiting freedom of speech, passed under the influence of "war psychology," has been sustained. The dissenting opinion considered the statute unconstitutional, because, among other reasons, the constitutional guaranty was surely intended to protect men in using revolutionary arguments, similar to those made by Adams, Jefferson, and Lincoln. See Wigmore, *Abrams v. U. S.: Freedom of Speech, etc.* (1920) 14 ILL. L. REV. 539; Corwin, *Freedom of Speech and Press Under the First Amendment* (1920) 30 YALE LAW JOURNAL, 48; COMMENTS (1920) 30 *ibid.* 68; (1920) 30 *ibid.* 861; COMMENTS (1922) 31 *ibid.* 422; COMMENTS (1922) 32 *ibid.* 178.

CONSTITUTIONAL LAW—WAIVER OF TRIAL BY JURY OF TWELVE MEN.—The defendant, indicted for a felony, consented to be tried by a jury of eleven men. After conviction he appealed on the ground that he could not waive the right to a trial by twelve jurors. *Held,* that the right could not be waived. *State v. Sanders* (1922, Mo.) 243 S. W. 771.

The federal provision guaranteeing a trial by a jury of twelve in criminal cases does not apply to the state courts. *Thompson v. Utah* (1898) 170 U. S. 343, 18 Sup. Ct. 620. Most state statutes are construed to mean that a defendant indicted for a felony cannot waive a jury trial by twelve men. *Harris v. People* (1889) 128 Ill. 585, 21 N. E. 563; *State v. Mansfield* (1867) 41 Mo. 470. A contrary result is generally reached, however, in the case of misdemeanors. *People v. Fisher* (1922, Ill.) 135 N. E. 751; *State v. Wells* (1904) 69 Kan. 792, 77 Pac. 547.

INSURANCE—INSURABLE INTEREST IN LIFE INSURANCE.—The insured took out a policy on his life naming as beneficiary the plaintiff, with whom he boarded, the latter agreeing to pay the premiums. The agent had knowledge of all the facts. A by-law of the company provided that no application would be accepted unless the beneficiary was a relative or dependent of the insured. In an action on the policy, the company pleaded a violation of this by-law. *Held,* that by accepting premiums for four years, the by-law was waived, and further, that no insurable interest was necessary. *Howard v. Commonwealth Beneficial Ass'n.* (1922, N. J. L.) 118 Atl. 449.

New Jersey has stood practically alone in this country in holding an insurable interest unnecessary in the absence of a statute to the contrary. *Thomas v. National Benefit Ass'n.* (1911, Sup. Ct.) 81 N. J. L. 349, 79 Atl. 1042; *Trenton Mutual Ins. Co. v. Johnson* (1854, Sup. Ct.) 24 N. J. L. 576. The instant case, however, is the first decision to that effect in the highest court of that state. See Vance, *Cases on Insurance* (1904) 65, note 21.

JUDGMENTS—PARTNERSHIP—VALID AS TO PARTIES SERVED WITH PROCESS, THOUGH ONE OF THEM IS NOT SERVED, AND JUDGMENT IS RENDERED AGAINST ALL.—The defendant corporation sued two partners on a judgment previously obtained against the firm. One partner had not been served with process in either action. Execution was issued on the second judgment and levy made on the property of a partner who had been served with process in the first action, but who was not a party to the second. This partner and the plaintiff bank, which held a deed of trust on the property, filed a bill to restrain the sheriff and the defendant corporation from selling the property, on the ground that since the judgment was void as to the

partner not served with process, it was void as to all the partners. *Held,* (one judge *dissenting*) that the levy was good since the obligations of the partners were joint and several, and therefore the judgments were valid as to those served with process in both actions. *Bank of Philadelphia v. Posey* (1922, Miss.) 92 So. 840.

Many states have reached this result, either by statute or by judicial decision. *Martin v. Hawkins* (1922, Tex. Civ. App.) 238 S. W. 991; *Myers v. Shipley* (1922, Md.) 116 Atl. 645; *Engstrand v. Kleffman* (1902) 86 Minn. 403, 90 N. W. 1054. The authorities are in conflict, but the instant case states the more desirable rule. See 1 Black, *Judgments* (1891) sec. 211; *cf. Livak v. Chicago & E. Ry.* (1921) 299 Ill. 218, 226, 132 N. E. 524, 527.

PROCESS—AMENDMENT—VOID SUMMONS NOT AMENDABLE.—The plaintiff mistakenly summoned the defendant to appear in the county court for an action which was pending in the district court. The defendant made special appearance in the district court objecting to its jursidiction for want of service of summons. The plaintiff asked permission to amend. *Held,* that the summons was not amendable. *Land v. Christenson* (1922, Neb.) 189 N. W. 838.

Since the summons named a court in which no action was pending against the defendant, it was void and therefore not amendable because there was nothing to amend. *Osborn v. McCloskey* (1878, N. Y.) 55 How. Prac. 345; *Roy v. Phelps* (1910) 83 Vt. 174, 75 Atl. 13.

PROPERTY—COVENANT AGAINST ENCUMBRANCES.—The defendant's deed contained a covenant warranting the land free from all encumbrances. The grantee, discovering that a drain built by contiguous property owners ran through this land, sued on the covenant. *Held,* that the plaintiff could not recover. *Carver v. Lane* (1922, Minn.) 190 N. W. 68.

An encumbrance is, as a general rule, any right or interest in land which exists in third persons to the diminution of its value. *Simons v. Diamond Match Co.* (1909) 159 Mich. 241, 123 N. W. 1132; 2 Tiffany, *Real Property* (2d ed. 1920) sec. 452. The instant case is of the minority, refusing to consider such a right an encumbrance if it confers any benefit to the owner of the land. *Stuhr v. Butterfield* (1911) 151 Iowa, 736, 130 N. W. 897; 36 L. R. A. (N. S.) 321, note; but see *Schwartz v. Black* (1915) 131 Tenn. 360, 174 S. W. 1146; NOTES (1915) 15 COL. L. REV. 626; *Eriksen v. Whitescarver* (1914) 57 Colo. 409, 142 Pac. 413; *Smith v. Sprague* (1867) 40 Vt. 43.

SUBROGATION—MONEY MISAPPROPRIATED AND USED TO MAKE UP ADMINISTRATOR'S SHORTAGE.—The treasurer of the plaintiff taxing district wrongfully appropriated funds of the district to make good his defalcations as administrator of a certain estate, which defalcations would otherwise have been made good by the defendant surety on the administrator's bond. The taxing district brought suit against the surety company for equitable relief by way of subrogation to the rights of the estate. *Held,* that the surety was liable. *First Taxing District v. Gregory* (1922, Conn.) 118 Atl. 96.

Equity frequently grants relief by way of subrogation where money is fraudulently appropriated for the payment of a debt. *Pittsburg-Westmoreland Coal Co. v. Kerr* (1917) 220 N. Y. 137, 115 N. E. 465; *Newell v. Hadley* (1910) 206 Mass. 335, 92 N. E. 507. For an application of the principles of subrogation to suretyship transactions, see (1919) 28 YALE LAW JOURNAL, 706.

TORTS—LIABILITY OF MANUFACTURER OF BOTTLED BEVERAGE.—The plaintiff purchased from a retail confectioner a bottle of soda water. Due to the presence

of some small particles of ground glass therein, he was seriously injured and sued the manufacturer for damages. *Held,* that the doctrine of *res ipsa loquitur* applied and that the plaintiff could recover. *Goldman and Freiman Bottling Co. v. Sindell* (1922, Md.) 117 Atl. 866.

There is a tendency in cases of this type to extend the right of action beyond the immediate purchaser to any person "who might reasonably be expected to suffer injury." *Heineman v. Barfield* (1918) 136 Ark. 500, 207 S. W. 58; *Mazetti v. Armour* (1913) 75 Wash. 622, 135 Pac. 633. The law on the subject, however, is still somewhat chaotic on the question whether the action is one of implied warranty or negligence or both. The real basis of recovery seems to lie in the necessary public policy of demanding the highest degree of care from manufacturers of prepared foods. For further discussion, see COMMENTS (1920) 29 YALE LAW JOURNAL, 782; (1918) 27 *ibid.* 1068.

TORTS—NEGLIGENCE—ATTRACTIVE NUISANCE.—The electric wires of the defendant railway company were strung over the top of a bridge thirty feet above the roadway. Small boys sometimes climbed up on the bridge, but were frequently chased off by policemen and railway guards. The plaintiff, a boy eight years old, climbed up on the bridge after a bird's nest, knowing at the time that he was not allowed to do so. While there he touched the electric wire and received the injuries for which this action was brought. *Held,* that the plaintiff could not recover since there was no basis for an inference of either an invitation or a license. *N. Y., N. H. and H. Ry. v. Fructer* (1922, U. S.) 43 Sup. Ct. ——.

This decision was not unexpected. See (1922) 32 YALE LAW JOURNAL, 200. For a criticism of the result reached in the Circuit Court of Appeals, see (1921) 30 *ibid.* 870.

VERDICTS—RECOMMENDATION BY JURY TO DONATE THE AMOUNT OF THE VERDICT TO CHARITY.—The plaintiff brought an action to recover secret profits made by the defendants who as agents purchased land for the plaintiff. There was a verdict for the plaintiff in the lower court, the jury recommending that the recovery be donated to the American Red Cross. The defendant appealed on the ground that the recommendation vitiated the verdict. *Held,* that the verdict would stand. *Robyn v. White* (1922, Minn.) 189 N. W. 577.

The instant decision is analogous to those cases where a recommendation of clemency is held not to vitiate the verdict, and is an interesting and rather unusual application of the rule that the portion of a verdict lying outside the legitimate province of the jury may be rejected as surplusage. See *Commonwealth v. Zec* (1918) 262 Pa. 251, 105 Atl. 279; *Robertson & Wilson Scale & Supply Co. v. Richman* (1920) 212 Mich. 334, 180 N. W. 470; *Smith v. Means* (1913) 170 Mo. App. 158, 155 S. W. 454.

WILLS—NUNCUPATIVE WILLS—WITNESSES MUST UNDERSTAND LANGUAGE IN WHICH WILL IS DICTATED.—The testatrix dictated her nuncupative will in French. One of the witnesses translated her words into English. The notary took down the translation and read it in English to the testatrix, who understood and spoke English imperfectly. Only one of the three witnesses understood French. *Held,* that the witnesses to a nuncupative will must understand the language in which it is dictated. *Lataprie v. Bandot* (1922, La.) 92 So. 776.

Nuncupative wills, where they still exist, are subject to strict statutory requirements and limitations. See Rood, *Wills* (1904) sec. 219 *et seq.* The modern tendency is to invalidate them altogether, except as to soldiers and sailors. 1 Schouler, *Wills, Executors and Administrators* (5th ed. 1915) sec. 365. The instant case seems correct.